Supreme Court, U.S.
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No. 01-1551

IN THE
Supreme Court of the United States

OCTOBER TERM, 2001

KENNETH PILIPSHEN,

Petitioner,

-v.-

IBM CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF RESPONDING TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULES

Rule 15.2, U.S. Sup. Ct. 1

1. Without explanation, IBM repeatedly alleges that the claims of Petitioner are "time-barred" (*e.g.*, pp. 6, 9, 11). However, IBM nowhere denies that, as set forth at pp.6- 7 of our Petition, Mr. Mattson[1] had made the knowingly false statement that Petitioner Pilipshen had contracted to work in Paris until the year 2000, falsely advising others that this made it inappropriate for Petitioner Pilipshen to be even considered for the other executive positions that became available in 1998 and 1999, thus preventing Petitioner Pilipshen from being considered for the positions available in 1998 and 1999. Thus, Petitioner's filing of a charge of discrimination in May, 1999 (IBM's Brief, p. 1) could not possibly have been time- barred.

In the case at bar, there is no problem of factual conflict to be sorted through to ascertain the truth: at no point whatsoever has IBM claimed that any of our factual recitations are false, thus waiving any such contention under this Court's Rule 15.2. Insofar as statements are made by IBM which are inconsistent with our recitals, they are demonstrably incorrect.[2]

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[1] Under the heading "Clarification of the Record" (p. 2), IBM recites that Mr. Mattson retired at the beginning of 1998, without any record citation. But Mr. Mattson had not retired - - he had been fired, as being untrustworthy. (A572, A588-A591, A646-9).

[2] IBM claims that the position in Paris was much coveted and desired by Petitioner. IBM ignores that Petitioner testified at deposition that he wanted the position in Paris only because he "didn't want to remain in the U.S. with the humiliation associated with being downleveled" (A152), and that he had "had no interest prior to *** my demotion" in the Paris position (A153). There is nothing in the Record to the contrary.

All that the Court need examine on an appeal is whether there were issues of fact sufficient to withstand summary judgment, and we submit that IBM has completely failed to show an absence of such issues.

2. Of course, as IBM argues (p. 10), this Court does not grant certiorari to review evidence and discuss specific facts. But in the case at bar, as in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the crucial facts were totally ignored in the determination below. While IBM argues that the case below was unreported and thus of no significance, part of its very significance lies in the fact that *Reeves* can be ignored and made worthless by simply ignoring the very basic facts of a case, made even more unpalatable by the fact that the decision is unreported and thus apparently relegates the case to obscurity. But the controversial use of unpublished opinions should not be a reason for failing to grant certiorari.[3]

3. In footnote 4 on page 7, IBM asserts that the Circuits whose approach we claim differ from the Second Circuit approach do not, in fact, so differ. However, a reading of the cases recited does not support IBM's conclusion.

4. In footnote 5 on page 10, IBM writes that it does not think it appropriate to dignify with a response what IBM terms

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[3] The supposed insignificance of "unreported" cases is belied by the fact that the federal unreported cases are indeed reported - - not only in Lexis and in WestLaw, but in a new publication called Federal Appendix. Indeed, IBM relies, in its very first citation in its string citation in its Footnote 4 on page 7, upon such a case, giving the Federal Appendix citation thereof. Non-publication of an "unpublished" opinion is thus now a complete fiction.

our "outrageous contention"that the Second Circuit District Courts are in "anarchy" or otherwise unable to decide discrimination cases fairly.

In making the argument that the situation in the Second Circuit is anarchic, we noted that it was "recognized by the legal community within the Second Circuit that the determination of summary judgment motions generally depends upon which District Judge the case may be assigned to" (Petition, p. 23).

We relied, in making what IBM calls that outrageous statement, upon an article in the New York Law Journal, reprinted at pp. A16-A20 of our Petition. That article noted that both management and employee lawyers attributed the lack of impact of *Reeves* "*** largely to the independent streak many Second Circuit judges exhibit at both the district and appellate court levels." (*Id.* at A18).

That article went on to quote attorney "Ronald M. Green, a management lawyer with Epstein, Becker & Green"(*Id.* at A16) as saying that "the Second Circuit is an enigma.", that "Here it's as much the judge as anything that determines whether you will get summary judgment" [in an employment discrimination case]. (*Id.* at A19). Ronald M. Green, the attorney who made the statement, is the Green who is a named partner in the law firm of Epstein, Becker & Green - - which appears for IBM here.[4]

Thus, it is IBM's counsel himself who made the statement that IBM now considers outrageous.

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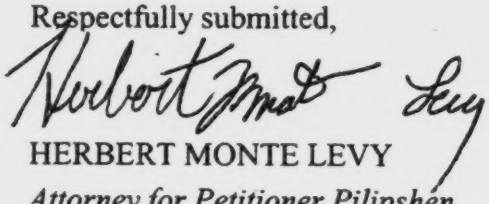
[3] That Mr. Green is the name partner in Epstein, Becker & Green appears from Martindale-Hubbell Law Directory 2001, at pp. NYC 428B-NYC 429B.

IBM counsel here is thus authority for the existence of a situation in the Second Circuit, which should be remedied through the grant of certiorari here.

CONCLUSION

This court should grant certiorari, reverse the decision below, and order that the matter be set down for trial.

Respectfully submitted,



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Dated: June 3, 2002